

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6860

Petitions of Vermont Electric Power Company, Inc. and Green Mountain Power Corporation for a Certificate of Public Good authorizing VELCO to construct the so-called Northwest Vermont Reliability Project, said project to include: (1) upgrades at 12 existing VELCO and GMP substations located in Charlotte, Essex, Hartford, New Haven, North Ferrisburg, Poultney, Shelburne, South Burlington, Vergennes, West Rutland, Williamstown, and Williston, Vermont; (2) the construction of a new 345 kV transmission line from West Rutland to New Haven; (3) the construction of a 115 kV transmission line to replace a 34.5 kV and 46 kV transmission line from New Haven to South Burlington; and (4) the reconductoring of a 115 kV transmission line from Williamstown, to Barre, Vermont

DEPARTMENT'S POST-HEARING REPLY BRIEF ON WHETHER TO REOPEN

The Department of Public Service ("DPS" or the "Department") files this brief with the Public Service Board ("PSB" or the "Board") in reply to the proposed findings and briefs filed on or about September 16, 2005 by the Conservation Law Foundation ("CLF"), the Vermont Electric Power Company, Inc. ("VELCO"), and the Town of New Haven ("New Haven"). DPS has received no other post-hearing briefs on the issue of whether to reopen.

The Department's prior-filed legal memoranda and proposed findings address the substance of the issues in this matter. Without conceding any points in the other parties' filings that are contrary to the Department's position, DPS will respond to particular issues in those filings rather than recapitulate all the issues. DPS responds to each of the above-listed parties in turn.

A. **Response to CLF**

CLF claims that the increase in project costs calls into question whether the project promotes the general good of the state, but does not address any of the detriment to the state that would arise if the project were reopened, including risking the reliable provision of electric service to Vermonters, cost impacts from demobilization and equipment ordering and handling,

and continued escalation of project costs during a reopened proceeding. CLF's brief contains no discussion of these real-world risks to the general good of Vermont.

CLF's other claims similarly miss the mark. While DPS agrees with CLF that the Board need not make an "entire evaluation" of the new cost estimates to decide whether to reopen, the Board should reject CLF's implication that the Board is somehow engaged now in such a process. Instead, the Board has heard evidence and argument on whether to reopen. CLF's claim that the Board cannot make an "honest evaluation" of the estimates based on the current record may have emotional appeal, but it is inapposite to the actual inquiry being made.

The Board also should reject CLF's claim that the hearing it held violates due process, since the Court ordered a decision on whether to reopen within 30 days, and the legal standard underlying CLF's case on whether to reopen would require the Board to take evidence unless a motion for summary judgment is granted or the parties stipulate to the facts. DPS will explain.

CLF's own motion is based on the "substantial change" test and a claim that the Board must reopen because the increase is such a change.¹ However, to reach the result sought by CLF, the "substantial change" test would require the Board to assess whether the increase has the potential for significant impacts *before* it reopens or, more properly, requires an amendment to the certificate of public good ("CPG"). In re Citizens Utilities Company, 179 P.U.R. 4th 16 (Vt. 1997), 94-5. To require such an amendment, the Board must affirmatively determine whether such

¹DPS advocates that, in this proceeding, the Board should apply VRCP 60(b) and not the "substantial change" test, for the reasons stated in its prior filings. The Department here highlights an internal inconsistency in CLF's arguments. As indicated in prior filings, DPS believes that the Board could decide whether to reopen under VRCP 60(b) without an evidentiary hearing, and asked that the Board exercise its discretion under that rule to hold such a hearing.

potential exists. Id.

The determination of the potential for significant impacts is a fact-based inquiry because the impacts must relate to one or more of the substantive § 248 criteria that address such issues as economic benefit, aesthetics, etc. 30 V.S.A. § 248(a), (b); Citizens, 179 P.U.R. 4th at 95. In prior Board decisions using the “substantial change” test cited by CLF, the Board made findings of fact and applied the legal standard to them to determine whether an amendment was required. Citizens, 179 P.U.R. 4th at 88-96; In re Petition of Vermont Elec. Coop., Docket No. 6544, Order of 2/20/02 at 3-7.

To make factual determinations, a hearing is required, since under the Vermont Administrative Procedure Act (the “APA”) findings must be made based on the evidence, which is presented at hearing. 3 V.S.A. § 809. Thus, to comply with the remand order and reopen the case under CLF’s legal theory, the Board had to hold an evidentiary hearing and render a decision within 30 days.

As the Board is aware, a grant of summary judgment prior to hearing would obviate the need for a hearing. Under VRCP 56(c)(3), such a judgment could have been granted if the moving party demonstrated it was entitled to judgment as a matter of law and there were no genuine issues of material fact (with all inferences resolved in favor of the nonmoving party). CLF appears to claim it is entitled to judgment as a matter of law, yet neither it nor any other party filed a motion for summary judgment prior to hearing.

Similarly, CLF did not attempt to seek a stipulation of facts among the parties, even though such a stipulation could have rendered an evidentiary hearing unnecessary.

The Board has not violated due process. Within the 30 days provided by the Court, the Board gave CLF the opportunity to request a hearing. It also held a hearing at which CLF could have attempted to present evidence, either through its own witnesses or cross-examination, that would support its legal claim that the increased cost estimate constitutes a “substantial change.” CLF simply failed to use these opportunities.

CLF’s related claim that due process requires reopening is also unpersuasive. Either the “substantial change” test underlying CLF’s request to reopen is met or it is not. There is no constitutional entitlement to an affirmative ruling on substantial change, nor is any such substantive ruling compelled by the APA, 3 V.S.A. § 801 *et seq.* Moreover, and separately, CLF demonstrates no affected liberty or property interest. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

B. Response to VELCO

DPS supports the overall result sought by VELCO and agrees with much of its brief. In this reply, the Department addresses the following areas of concern: VELCO’s request for prudence determinations, its requests for findings that would go to the merits if the Board reopened, its arguments to avoid cost controls, and its post-hearing request to take official notice.

Prudence Determinations. For two separate reasons, the Board should deny VELCO’s requests for findings that its estimating process and estimates are “prudent” and “appropriate.” First, such findings are not within the scope of the Court’s remand, which is limited to whether to reopen the proceeding. This is not an investigation into the merits of whether VELCO’s estimating practices are or were prudent and appropriate; instead, the current inquiry is about making a threshold determination on whether to reopen a § 248 proceeding.

Second, apart from the scope of the Court's remand, the Board has repeatedly stated a strong and long-standing policy of disfavoring prudence determinations, or otherwise guaranteeing rate recovery, outside of ratemaking proceedings. In re Proposed Sale of Vt. Yankee Nuclear Power Station, Docket No. 6545, Order of 6/13/02 at 87-104; In re Central Vermont Public Service Corp.'s Integrated Resource Plan, Docket No. 6854, Order of 3/9/04 at 13-17. VELCO has provided no argument or evidence supporting a deviation from that policy in this case.

Findings on the Merits of the Section 248 Criteria. The Board should deny other findings requested by VELCO that go beyond the issue of whether to reopen and instead would be relevant if the Board decided to reopen. The Board should be careful to focus its findings on the issue at hand, which is whether to reopen, and not determine the merits of the new cost estimates under the Section 248 criteria. For example, the Board should not make VELCO's requested findings on the economic benefit criterion, which would not properly be part of a decision to reopen because they address the merits. DPS recognizes that VELCO's proposed findings on economic benefit restate findings made on the merits by the Board in its order of January 28, 2005 (the "Order"), but this fact only reinforces the Department's point. The Board has already made these findings on the merits and it need not, and should not, do so again now.

VELCO's proposed findings on alternative resource configurations ("ARC") also go beyond the issue of whether to reopen and address the merits. The issue at hand on the alternatives analysis performed by La Capra Associates is whether that evidence demonstrates a reason to reopen the proceeding, e.g., the increased cost estimates somehow render the ARCs feasible to implement in time to meet the reliability need. There is no evidence in the analysis that would

support such a finding, and the Board should not go further and make findings on the merits of the analysis as proposed by VELCO. Whether or not any party agrees or disagrees in substance with the new findings proposed by VELCO on the infeasibility of the ARCs, they would only be proper for the Board to make if it decided to reopen the proceeding and reconsider the ARCs' feasibility. Similarly, the proposed findings on the current cost-effectiveness of the ARCs would only be apposite if the Board determined to reopen.

Arguments against Cost Controls by the Board. DPS strongly disagrees with VELCO's arguments that seek to avoid imposition of cost controls by the Board over § 248 projects. DPS notes that this disagreement is about future proceedings, because DPS does not advocate that the Board actually impose such controls in the decision before it, which is limited to whether to reopen. DPS will respond, however, because of the seriousness of the issue.

DPS supports and welcomes the reforms that VELCO has undertaken with regard to accuracy in estimates and controlling costs, and believes that current management is sincere in these efforts. But to protect the ratepayers of Vermont, it is not sufficient in the long run to rely on internal company practices and the good intentions of management. Both internal practices and company management may change.

The Board therefore should consider, in the future, instituting reasonable mechanisms to promote greater accuracy in cost estimating and cost control for § 248 projects. The lack of such controls advocated by VELCO may seem beneficial from the company's perspective but it does not promote the long-term interests of ratepayers. Moreover, as New Haven correctly notes, VELCO's rates are set not by the Board but by the Federal Energy Regulatory Commission

(“FERC”), and § 248 proceedings represent an opportunity for the Board to address the costs of VELCO capital projects. Because of the pressing reliability and cost implications of reopening, the Department does not believe this point warrants reopening the current case, but it does support change in how future projects are handled.

DPS also takes exception to VELCO’s claim that “arbitrary” cost ceilings have been suggested in the proceeding. In future proceedings, DPS advocates the Board consider whether to impose cost ceilings, or some other conditions related to controlling cost, based on evidence presented by the parties. Such evidence could include testimony on the reliability of the cost estimate presented and the margin of error (e.g., plus or minus a certain percentage).

In this connection, DPS notes that the ISO-NE’s approval of the project for PTF funding included a ceiling amount, namely \$156 million, even though VELCO’s estimate original estimate (subtracting Sand Bar) was \$120 million. Order of 1/28/05 at 35; VELCO Exhibit TD-21. There is no evidence in the record that VELCO had any discomfort with ISO-NE’s setting a ceiling beyond which re-approval would be required. If ISO-NE can set a limit to protect the amount of a project that the region funds, then the Board can set a limit to protect Vermont ratepayers.

VELCO is not persuasive when it points to the imminence of Vermont’s reliability problem as evidence that a cost ceiling would be “bad policy.” The real import of this argument is to underscore the need to promote better cost estimates and long-range transmission planning because, in the scenario discussed by VELCO, a maximum allowed cost is a problem only if the initial estimate for the project is subject to wide variation and system planning activities have not addressed deficiencies sufficiently in advance.

In addition, if this case were one in which the costs of alternatives had been the deciding factor rather than the time to implement them, then Vermonters could face significant unnecessary cost if an option thought to be least-cost based on an estimate subject to wide variation turned out to be far more expensive than a rejected option to meet the same need.

VELCO's Request to Take Official Notice. DPS opposes VELCO's request to take official notice of a Department of Energy table regarding cost estimating. VELCO has not established that the estimation hierarchy and margins of error stated in the table constitute facts "not subject to reasonable dispute," which VELCO must do in order support its request. VRE 201; 3 V.S.A. § 810(1). It is not self-evident that this information is indisputable. Reasonable people could differ on how one conducts estimates, the proper hierarchy and purpose of different types of estimates, and what margin of error to assign to those different types.

In the alternative, if the Board grants VELCO's request, then the Board should conclude that the document supports the necessity to take future steps to control costs and ensure better cost estimating. In this regard, the table submitted by VELCO and related argument suggest that continued use of the type of estimate submitted for the NRP may not be the best basis for findings by the Board. Specifically, in its brief, VELCO states based on the table an accuracy range for the original estimate of plus or minus 40 percent. In a \$120 million project, that accuracy range means the cost could be as high as \$168 million. Moreover, by stating an accuracy range of ± 40 percent, VELCO associates the original project estimate with the first type of estimate listed on the table, a "Planning/Feasibility or Order of Magnitude Estimate," which is the only listed estimate type with that same stated accuracy range. Yet the table states that such an estimate should be used only for

scoping studies and preliminary budget estimates of total project costs.

VELCO's witness may stand behind the original estimate, but if VELCO's pre-CPG project estimates continue to be subject to such large accuracy ranges, then as a long term practice they may not be solid enough for the Board to stand on as it makes further decisions affecting Vermont's transmission system and its ratepayers.

C. **Response to New Haven**

DPS addresses the following areas in turn: whether New Haven's brief meets its burden to show it has a meritorious claim under VRCP 60(b)(3) and its arguments on PTF, feasibility of alternatives, and impact on Vermonters.

VRCP 60(b)(3) Claim. New Haven's brief lacks any clear and convincing showing that VELCO has committed misconduct or that any such misconduct prevented New Haven from fully and fairly litigating this case. New Haven simply claims that it has not had its "day in court" on an NRP costing \$228 million. This bare claim is insufficient to meet New Haven's burden under the grounds cited in its motion to reopen. See Gavala v. Claassen, 2003 VT 16 ¶ 5, 175 Vt. 487 (2003) (a party seeking to reopen must demonstrate misconduct by clear and convincing evidence); Karak v. Bursaw Oil Corp., 288 F.3d 15, 21 (1st Cir. 2002) (party must show clearly and convincingly that misconduct prevent party from fully and fairly presented its case at trial).

PTF. New Haven overstates the role of the PTF contribution in the Order, the plain language of which demonstrates that this contribution was not the key basis for granting the CPG.

For example, as demonstrated in the Department's proposal for decision on remand, the Board's decision to endorse the N-2 and resource adequacy standards was based on "two

independent rationales,” each of which was unrelated to the costs of meeting that standard generally or the specific PTF contribution for the project. Order of 1/28/05 at 17. The first rationale was simply that, at various levels of oversight, Vermont is expected to meet those standards. The second independent rationale was the importance of reliable electric power to a Vermont economy and society that are increasingly dependent on electricity, coupled with the fact that Vermont is served by far fewer lines than other areas of the country, leaving Vermont with limited operational flexibility to manage and recover from outages. Id. at 17-18.

Separately, the evidence introduced at hearing demonstrates that the region is likely to fund at least three-quarters of the total cost of the Northwest Reliability Project (“NRP”), if not more. See DPS Proposal for Decision at 7-9 (Sep. 16, 2005) and citations to the record therein.

New Haven’s citation to Paul Chernick’s testimony on the probability of events is a reprise of argument that preceded the issuance of a CPG. New Haven makes no demonstration that the estimated cost increase in the NRP affects the probability of contingencies. Moreover, Mr. Chernick’s testimony on this point was flawed because it assumed that the contingencies are independent events, ignoring the possibility that an outage of one component places additional stress on the system which can increase the likelihood that other components will fail. 2/20/04 tr., vol. 2 at 18 (Chernick).

New Haven’s discussion of the carrying costs associated with Vermont’s contribution to the NRP is less than convincing since the non-transmission solutions to the reliability problem contained in the ARCs (which New Haven advocates) would have far greater carrying costs to Vermont than the NRP. VELCO Exhibit MDM-2 at 87; VELCO Exhibit Remand-2 at 8.

New Haven's claim that, under the original proposal, Vermonters "would pay about \$11 million for a \$126 million package" ignores that the Board, for reasons relating to its evaluation of the project's impacts under the § 248(b) criteria, imposed significant conditions which changed the scope of the project. These changes include the New Haven substation relocation and line burial in Shelburne. Given that these changes to the project necessarily added cost to the original project estimate, it cannot be true that the Board only approved a "\$126 million package." Moreover, since on the date of the Order the ISO-NE had not decided on regional cost-sharing for these project changes, there was no certainty then that the region would share in the changes' incremental cost. The testimony of ISO-NE witness Stephen Whitley made this lack of certainty particularly clear with respect to the incremental cost of burial. 2/17/03 tr., vol. 1 at 23-41 (Whitley).

Feasibility of Alternatives. New Haven's arguments on the feasibility of alternatives to the NRP include a restatement of arguments made prior to issuance of a CPG. New Haven proffers no persuasive argument that the increased cost estimates for the NRP make the ARCs any more able to meet the need in a timely manner. In addition, the Board rejected the "DSM only" option discussed by New Haven on the grounds that it would not meet the need because that option included demand-side savings from zones within in Vermont that "would have no material impact on the import capability of the system into northwest Vermont during summer peaks." Order of 1/28/05 at 54.

New Haven's other argument on alternatives, that VELCO did not provide revised estimates for certain transmission-only alternatives requested by the Department, ignores that the Department's request was for "[a] revised cost estimate for transmission-only alternatives (4) and

(5) listed in Finding 67 of the Order, or *other evidence supporting the assertion that the estimated cost of these alternatives has risen.*” Department’s Memorandum on Whether to Reopen and Request for Evidentiary Hearing at 16 (Sep. 1, 2005) (emphasis added). VELCO put forward evidence showing that the market factors affecting the cost of the NRP would affect all transmission-only alternatives to the NRP, including those examined previously in this docket, the costs of which would be expected to rise at roughly the same rate as the increase in the costs of the NRP. 9/12/05 tr. at 91-2, 230-31 (LaForest).

Impacts on Vermonters. The evidence shows that Vermonters risk increasing the amount of NRP costs they may bear if the proceeding is reopened, since the inflationary trends driving the increase likely will continue and the ISO-NE may deny regional cost-sharing for an incremental increase in project costs caused by reopening. 9/12/05 tr. at 244-6 (Bowers, LaForest). It makes little sense to pause for a formal assessment of rate impacts from the rise in estimated project cost if doing so stands a serious chance of increasing those impacts.²

DPS also disputes the legitimacy of New Haven’s description of the impacts to Vermont as “\$50 to 87 million in Vermont rate increases” or the comparison of those figures to a recent rate case involving Central Vermont Public Service Corporation (“CVPS”). The cost of the NRP to Vermont will be paid over a number of years, as New Haven’s other argument about carrying costs

²DPS disagrees with New Haven’s characterization of why the Department withdrew the testimony of Ron Behrns on rate impacts of the NRP and alternatives. As the Department’s letter of February 18, 2004 withdrawing that testimony stated, Mr. Behrns’ prefiled testimony and exhibits were incorrectly based on a preliminary draft of the La Capra study and not on the study as admitted into evidence. In the Department’s view, correction of that testimony could well have resulted unnecessarily in additional discovery and hearing delays.

implicitly acknowledges. The rate impacts from this cost would therefore happen over time, not at all at once. In contrast, the figures discussed by New Haven related to CVPS are annualized revenue amounts. The comparison is not valid.

Further, notwithstanding its stated concern about project rate impacts, New Haven has argued for highly expensive measures to mitigate aesthetic impacts of the NRP for which, as demonstrated above, there was no certainty of regional cost sharing. For example, one driver of the increase is the substation relocation advocated by New Haven. VELCO Exhibit Remand-7. Similarly, burying the 115 kV line at the Route 17 crossing, as sought by New Haven, would entail significant expense, given the Board's findings on the cost of 115 kV burial generally and the evidence proffered by VELCO that the cost of such burial has increased since the Order. Order at 99; VELCO Exhibit Remand-7; 9/12/05 tr. at 172-3, 178-9 (Pence). Thus, New Haven seeks measures which may have adverse rate impacts on Vermonters.

Finally, New Haven's claims regarding the impact of the increase on Vermonters place far too little weight on the reliability exposure that they risk as the VELCO system load approaches the critical 1,100 MW load level. Reopening the proceeding places VELCO in the position of having to arm its under-voltage load shedding scheme in order to protect the system against contingencies. In the event of a contingency that causes the requisite voltage reduction, the system could drop Burlington or other load pockets. 9/12/05 tr. at 72-4 (LaForest). That would be an impact to Vermonters.

D. **Conclusion**

On the issue of whether to reopen, the Board should adopt the proposal for decision

submitted by the Department on September 16, 2005 and decline to exercise its discretion to reopen this proceeding in light of the increased cost estimates noticed by VELCO on July 8, 2005.

As argued in that proposal, the potential detriment to the general good of the state outweighs the factors favoring reopening. Delaying the project while its approval is being revisited will risk the provision of reliable electric service to Vermonters, a risk that is of increasing concern as the VELCO system quickly approaches the 1,100 MW load level at which the Board found that all elements of the NRP are needed (except for the expansion of a device at the Granite substation).

Such delay also risks continued escalation in the cost of the NRP because the trends driving the increase are likely to continue during the reopened proceeding. Since the infeasibility of alternative resource configurations remains unchanged by the new cost estimates and the cost of transmission-only alternatives has risen at the same rate as the cost of the NRP, there is a substantial possibility that the outcome of a reopened proceeding would be to proceed with the NRP but at an even higher cost. Vermonters would risk bearing the increment of cost attributable to the delay for reopening, as well as costs that may ensue from reopening related to demobilization, order cancellation, and handling and storage of large equipment.

Moreover, those favoring reopening have not met their burden to demonstrate that they have a meritorious claim. They have not persuasively demonstrated that the new cost estimates make the ARCs any more feasible, thereby affecting the outcome of the proceeding. They have not provided a clear and convincing argument that VELCO committed misconduct or that any such misconduct deprived them of the ability to fully and fairly litigate the case.

The Board should rule that a substantial cost increase in a § 248 project can be grounds to reopen, and it should take measures in future cases to control costs and promote better accuracy in cost estimates. But under the facts and circumstances of this case, it should decline to reopen the proceeding.

Dated at Montpelier, Vermont this 19th day of September, 2005.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: _____
Aaron Adler, Special Counsel

cc: Attached Service List